

No. ED99038

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

SAXONY LUTHERAN HIGH SCHOOL, INC.,

Respondent,

v.

STRACK EXCAVATING, LLC, and

MISSOURI LAND RECLAMATION COMMISSION,

Appellants.

**Appeal from the Circuit Court of Cape Girardeau County
The Honorable William L. Syler, Presiding**

RESPONDENT'S OPENING BRIEF

**Stephen G. Jeffery, MBE 29949
Bruce A. Morrison, MBE 38539
20 S. Central Avenue, Suite 306
Clayton, Missouri 63105-1715
(314) 561-8503
(314) 714-6510 - Fax**

December 10, 2012

ATTORNEYS FOR RESPONDENT

Table of Contents

Table of Authorities	ii
Jurisdictional Statement	1
Statement of Facts	1
Proceedings in the Court Below	5
Points Relied Upon.....	6
Argument	8
Standard of Review	8
I. THE MISSOURI LAND RECLAMATION COMMISSION ERRED IN APPROVING STRACK’S PERMIT APPLICATION BECAUSE, PURSUANT TO § 444.771, R. S. MO., THE COMMISSION WAS PROHIBITED FROM ISSUING A MINING PERMIT IF THE MINE PLAN BOUNDARY WAS LOCATED WITHIN 1,000’ OF AN ACCREDITED SCHOOL AND THE COMMISSION HAD NO AUTHORITY TO RELOCATE THE MINE PLAN BOUNDARY, IN THAT STRACK’S MINE PLAN BOUNDARY WAS LOCATED 55’ FROM AN ACCREDITED SCHOOL AND THE COMMISSION DID ATTEMPT TO UNILATERALLY RELOCATE STRACK’S MINE PLAN BOUNDARY WHILE THE APPLICANT MADE NO EFFORT TO RELOCATE ITS MINE PLAN BOUNDARY	9
A. The Commission’s approval of the Strack permit application was unlawful because Strack’s mine plan boundary was located 55’ from Saxony Lutheran High School	9
B. The Commission’s approval of the Strack permit application was unlawful because the Commission had no authority to unilaterally relocate Strack’s mine plan boundary	10
II. THE MISSOURI LAND RECLAMATION COMMISSION ERRED IN APPROVING STRACK’S PERMIT APPLICATION BECAUSE, PURSUANT TO § 444.772.10, R. S. MO., THE NOTICE REQUIRED BY THE STATUTE MUST SPECIFY THE ACREAGE OF THE PROPOSED MINE, AND THE NOTICE STRACK GAVE DID NOT SPECIFY THE MINE’S ACREAGE, IN THAT STRACK GAVE NOTICE OF A 76 ACRE MINE AND THE COMMISSION UNILATERALLY CHANGED THE PROJECT TO A 53 ACRE MINE.....	17

The Commission's approval of the Strack permit application was unlawful because Strack gave notice of a 76 acre mine and the Commission unilaterally changed the project to a 53 acre mine.....	17
Conclusion	19
Rule 84.06(c) Certification	20
Certificate of Service	20
Appendix	

TABLE OF AUTHORITIES

Cases

Albanna v. State Bd. of Registration for Healing Arts, 293 S.W.3d 423 (Mo. banc 2009).....	8
AT & T Information Systems, Inc. v. Wallemann, 827 S.W.2d 217 (Mo. App. W.D. 1992)	14
Brooks v. Pool-Leffler, 636 S.W.2d 113 (Mo. App. E.D. 1982)	14
Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126 (Mo. App. E.D. 2007)	13
Hadlock v. Director of Revenue, 860 S.W.2d 335 (Mo. banc 1993).....	13
J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp., 881 S.W.2d 638 (Mo. App. E.D. 1994)	13
Lake Ozark/Osage Beach Joint Sewer Bd. v. Missouri Dept. of Natural Res., 326 S.W.3d 38 (Mo. App. W.D. 2010)	7,18
Mueller v. Missouri Hazardous Waste Management Com'n, 904 S.W.2d 552 (Mo. App. S.D. 1995)	6,14,15,16
Oakes v. Mo. Dept. of Mental Health, 254 S.W.3d 153 (Mo. App. E.D. 2008).....	8
Phillips v. Schafer, 343 S.W.3d 753 (Mo. App. E.D. 2011).	8
S. Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659 (Mo. banc 2009).....	13
Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. banc 1998).....	13
State v. McLaughlin, 265 S.W.3d 257 (Mo. banc 2008)	13

Revised Statutes of Missouri

§ 260.205.5(7).....	11
§ 260.395.2	11
§ 444.771	3,6,10,13
§ 444.772.10	7,17,18,19
§ 444.773	3,13
§ 444.773.3	3,6
§ 477.050	1
§ 512.020(5).....	1
§536.140.2	8
§ 643.075.2	12
§ 644.051.3	12

Other Authorities

Article V, § 3, Missouri Constitution	1
---	---

JURISDICTIONAL STATEMENT

This is a civil action for judicial review of a contested case. The Missouri Land Reclamation Commission approved Strack Excavating, LLC's application for a limestone quarry to be located in Cape Girardeau County, Missouri. Saxony Lutheran High School sought judicial review in the Circuit Court of Cape Girardeau County. The Circuit Court entered judgment in favor of Saxony Lutheran High School and reversed the decision of the Missouri Land Reclamation Commission. The Missouri Land Reclamation Commission and Strack Excavating, LLC, have appealed.

This appeal is authorized by § 512.020(5), R. S. Mo., and lies in the general jurisdiction of the Missouri Court of Appeals because this appeal involves no matter over which the Supreme Court has exclusive jurisdiction under Article V, § 3, of the Missouri Constitution. Cape Girardeau County is within the jurisdictional territory of the Eastern District under § 477.050, R. S. Mo.

STATEMENT OF FACTS

On November 4, 2010, Strack Excavating, LLC ("Strack") submitted to the Missouri Land Reclamation Commission ("the Commission") an application pursuant to Chapter 444, R.S. Mo., for a limestone quarry to be located east of Highway 61 and along County Road 601, just south of Fruitland, Missouri. LF 22, 169, Pet. Ex. B.¹ Saxony Lutheran High School, Inc., an accredited, private Lutheran high school at 2004 Saxony Lane along County Road 601 in Jackson, Missouri ("Saxony"), is located

¹ References to the Legal File will be cited as "LF".

adjacent, and to the south, of the proposed Strack quarry. LF 597-98. Saxony has operated an accredited school there since November, 2004. LF 591, 597-98.

Strack's permit application identifies the acreage of its proposed quarry as 76 acres in size. LF 169, Pet. Ex. B. The entire southern portion of the Strack property comprises the 76 acre long term mine area, and Strack's mine plan boundary is 55 feet from Saxony's northern property boundary. LF 459. Detail Map #1 of the permit application shows the 76 acre long term mine area as well as the mine plan boundary. LF 169, Pet. Ex. B. The outer perimeter of the mine plan boundary is shown as the hashed line labeled "Approximate Limits of Mining" on Strack's Location Map (LF 18, 169, Pet. Ex. B), a copy of which appears in the Appendix to this brief.

Pursuant to § 444.772.10, R. S. Mo., on November 22, 2010, the Department of Natural Resources ("DNR") advised Strack of the requirement to advertise and mail notice of its intent to operate a surface mine. LF 170, Res. Ex. 2. Strack subsequently published and mailed notice of its proposal for a 76 acre quarry. LF 170, Res. Ex. 3.

Following the required notice, the Commission conducted a 45 day public comment period on the permit application and received approximately 2,600 letters and comments opposing the proposed quarry. LF 170, Res. Ex. 4. The Commission asked Strack to conduct a public meeting regarding its permit application, but Strack declined. LF 169, Pet. Ex. C.

On January 11, 2011, Mike Larsen, Staff Director of the Land Reclamation Program, made his "formal recommendation to the commission regarding the issuance or denial of [the] applicant's permit" as required by section 444.773.3 of the Land

Reclamation Act. LF 87, 170, Res. Ex. 4. It was his “recommendation to the commission to issue the new site permit expansion for 76 acres at the Site #2 Quarry in Cape Girardeau County sought after by Strack Excavating L.L.C.” LF 87, 170, Res. Ex. 4. He “recommended approval of the pending mining permit application . . .” LF 87, 170, Res. Ex. 4. The Commission subsequently scheduled a public hearing on the proposed quarry on its January, 2011, agenda. LF 170, Res. Ex. 4.

On January 27, 2011, the Commission conducted the public hearing pursuant to § 444.773, R. S. Mo., to afford parties the opportunity to show they have “standing” to request the Commission to conduct a full evidentiary hearing on whether the Strack permit should be issued. LF 169, Pet. Ex. C. “Standing” is defined in § 444.773, R. S. Mo., such that persons opposed to the proposed permit must “present good faith evidence that their health, safety or livelihood would be unduly impaired by the issuance of the mining permit.”

On February 7, 2011, the Commission granted the request of Saxony for a Formal Public Hearing, assigning W.B. Tichenor as Hearing Officer. LF 5. Pursuant to § 444.773.3, R.S. Mo., a formal public hearing on Strack’s mining permit application was held over four days on July 5, 6, 7 and 12, 2011. LF 172. Throughout the formal hearing, Strack’s mine plan boundary was 55’ north of Saxony’s property, as shown in Figure 1 (reproduced in the Appendix). LF 48-49. In the midst of the hearing, on July 11, 2011, the Governor signed House Bill 89, which contained an emergency clause, into law. LF 42, 140. House Bill 89, *inter alia*, enacted § 444.771, R. S. Mo., which provides:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.

LF 43, 140. Without delay, Saxony asked the Hearing Officer to take official notice of House Bill 89, and moved for accelerated determination on the ground that the newly enacted legislation prevented the Commission from issuing the permit. LF 41-45. On July 12, 2011, the Hearing Officer denied Saxony's motion for accelerated determination. LF 48-50. In light of the newly enacted legislation, Saxony rested its case. LF 1026. At that point, Strack moved for a directed verdict (LF 700), which the hearing officer granted on July 18, 2012. LF 60-61.

On August 24, 2011, the Hearing Officer issued his recommended order. LF 121. The recommended order discusses at length House Bill 89 and, in particular, whether the Commission has the statutory authority to impose a special condition in a mining permit that moves a mine plan boundary. LF 141. The Hearing Officer's order recommended that the Commission approve the Strack permit application with the mine plan boundary to be located one thousand feet from the Saxony - Strack property line. LF 145. This, in the Hearing Officer's estimation, would effectively alter the project from a 76 acre mine

to a 53 acre mine. LF 144. As of August 24, 2011, Strack's applied-for mine plan boundary still was located 55 feet from the School. LF 48-49.

On September 22, 2011, the Commission decided Saxony's appeal against Saxony and entered its Final Order, fully adopting the Hearing Officer's recommended order. LF 150-51. The Final Order states:

Hearing Officer, W. B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of Permit #0832 be approved, with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack - Saxony property line, in compliance with and as required by section 444.731 R. S. Mo.

LF 151 (*italics in original*).

As of September 22, 2011, Strack had not submitted any documentation to the Commission or taken any other action whatsoever to change the location of its mine plan boundary from that shown in its original application in Figure 1. LF 169, Pet. Ex. B.

Proceedings in the Court Below

On October 21, 2011, Saxony filed a petition for judicial review and declaratory judgment in the Cape Girardeau County circuit court. LF 4, 153. After briefing and argument, on September 12, 2012, the Court below entered judgment for Saxony and against the Commission and Strack. LF 221. On September 26, 2012, the Circuit Judge denied Strack's motion to amend the judgment. LF 1. This appeal followed. LF 1, 234, 281.

POINTS RELIED UPON

- I. THE MISSOURI LAND RECLAMATION COMMISSION ERRED IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE, PURSUANT TO § 444.771, R. S. MO., THE COMMISSION WAS PROHIBITED FROM ISSUING A MINING PERMIT IF THE MINE PLAN BOUNDARY WAS LOCATED WITHIN 1,000' OF AN ACCREDITED SCHOOL AND THE COMMISSION HAD NO AUTHORITY TO RELOCATE THE MINE PLAN BOUNDARY, IN THAT STRACK'S MINE PLAN BOUNDARY WAS LOCATED 55' FROM AN ACCREDITED SCHOOL AND THE COMMISSION DID ATTEMPT TO UNILATERALLY RELOCATE STRACK'S MINE PLAN BOUNDARY WHILE THE APPLICANT MADE NO EFFORT TO RELOCATE ITS MINE PLAN BOUNDARY.**

§ 444.771, R. S. Mo.

§ 444.773.3, R. S. Mo.

Mueller v. Missouri Hazardous Waste Management Com'n,

904 S.W.2d 552 (Mo. App. S.D. 1995)

**II. THE MISSOURI LAND RECLAMATION COMMISSION
ERRED IN APPROVING STRACK'S PERMIT APPLICATION
BECAUSE, PURSUANT TO § 444.772.10, R. S. MO., THE
NOTICE REQUIRED BY THE STATUTE MUST SPECIFY THE
ACREAGE OF THE PROPOSED MINE, AND THE NOTICE
STRACK GAVE DID NOT SPECIFY THE MINE'S ACREAGE,
IN THAT STRACK GAVE NOTICE OF A 76 ACRE MINE AND
THE COMMISSION UNILATERALLY CHANGED THE
PROJECT TO A 53 ACRE MINE**

§ 444.772.10, R.S. Mo.

Lake Ozark/Osage Beach Joint Sewer Bd. v. Missouri Dept. of Natural
Res., 326 S.W.3d 38 (Mo. App. W.D. 2010)

ARGUMENT

Standard of Review

On review of a contested case, the Appellate Court determines whether the agency's decision is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the agency, is unsupported by competent and substantial evidence upon the whole record, is for any other reason unauthorized by law, is made upon unlawful procedure or without a fair trial, is arbitrary, capricious or unreasonable, or involves an abuse of discretion. Section 536.140.2, R. S. Mo.; *Phillips v. Schafer*, 343 S.W.3d 753, 757 (Mo. App. E.D. 2011).

On appeal from the circuit court's review of an agency's decision, the Court of Appeals reviews the action of the agency, not the action of the circuit court. *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc 2009); *Phillips v. Schafer*, 343 S.W.3d at 757. When the agency's decision involves a question of law, as in this case, the court reviews the question de novo. *Oakes v. Mo. Dept. of Mental Health*, 254 S.W.3d 153, 157 (Mo. App. E.D. 2008)

I. THE MISSOURI LAND RECLAMATION COMMISSION ERRED IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE, PURSUANT TO § 444.771, R. S. MO., THE COMMISSION WAS PROHIBITED FROM ISSUING A MINING PERMIT IF THE MINE PLAN BOUNDARY WAS LOCATED WITHIN 1,000' OF AN ACCREDITED SCHOOL AND THE COMMISSION HAD NO AUTHORITY TO RELOCATE THE MINE PLAN BOUNDARY, IN THAT STRACK'S MINE PLAN BOUNDARY WAS LOCATED 55' FROM AN ACCREDITED SCHOOL AND THE COMMISSION DID ATTEMPT TO UNILATERALLY RELOCATE STRACK'S MINE PLAN BOUNDARY WHILE THE APPLICANT MADE NO EFFORT TO RELOCATE ITS MINE PLAN BOUNDARY.

A. The Commission's approval of the Strack permit application was unlawful because Strack's mine plan boundary was located 55' from Saxony Lutheran High School

Saxony Lutheran High School is an accredited, private Lutheran high school, and has operated an accredited school at its current location since November, 2004. LF 591, 597-98.

Strack submitted its application for a mining permit in November, 2010. LF 22, 169, Pet. Ex. B. Strack's mine plan boundary is 55 feet from Saxony's northern property

boundary. LF 459. Strack has not submitted an application, mine plan, or any other document to the Commission which locates the mine plan any further than 55 feet from Saxony's property. LF 169, Pet. Ex. B.

On July 11, 2011, the Governor signed House Bill 89, which contained an emergency clause, into law. LF 42, 140. House Bill 89, *inter alia*, enacted § 444.771, R. S. Mo., which provides:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.

LF 43, 140.

Because Strack's mine plan boundary is within 1,000 feet of real property where Saxony has operated a fully accredited school since November, 2004, the Land Reclamation Commission was prohibited by § 444.771 from approving Strack's application for an industrial minerals permit.

B. The Commission's approval of the Strack permit application was unlawful because the Commission had no authority to unilaterally relocate Strack's mine plan boundary

The Department of Natural Resources (“DNR”), along with its assigned commissions, administers and regulates environmental concerns in Missouri. There are several commissions housed within DNR, including the Missouri Air Conservation Commission, which issues air construction permits in accordance with § 643.075, R. S. Mo., to new sources of air pollutants; the Missouri Clean Water Commission, which issues discharge permits under § 644.051, R. S. Mo., to facilities that discharge contaminants into waters of the State; the Missouri Hazardous Waste Commission, which issues permits under § 260.395, R. S. Mo., to persons who transport hazardous waste in Missouri; and the DNR, which issues permits under § 260.205, R. S. Mo., for the operation of solid waste disposal facilities in Missouri.

With respect to each of the foregoing environmental permits, the enabling statute expressly confers statutory authority on the issuing agency or commission to impose appropriate conditions in the permit. See § 260.205.5(7), R. S. Mo., (solid waste) (“When the review reveals that the facility or area does conform with the provisions of sections 260.200 to 260.345 and the rules and regulations adopted pursuant to sections 260.200 to 260.345, the department shall approve the application and shall issue a permit for the construction of each solid waste processing facility or solid waste disposal area as set forth in the application ***and with any permit terms and conditions which the department deems appropriate....***”); § 260.395.2, R. S. Mo., (hazardous waste) (“ If the department determines the application conforms to the provisions of any federal hazardous

waste management act and sections 260.350 to 260.430 and the standards, rules and regulations adopted pursuant to sections 260.350 to 260.430, it shall issue the hazardous waste transporter license *with such terms and conditions as it deems necessary* to protect the health of humans and the environment ...”); § 643.075.2, R. S. Mo., (air) (“Every source required to obtain a construction permit shall make application therefor to the department and shall submit therewith such plans and specifications as prescribed by rule. The director shall promptly investigate each application and if he determines that the source meets and will meet the requirements of sections 643.010 to 643.190 and the rules promulgated pursuant thereto, he shall issue a construction permit *with such conditions as he deems necessary* to ensure that the source will meet the requirements of sections 643.010 to 643.190 and the rules”); and § 644.051.3, R. S. Mo., (water) (“If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, the director shall issue a permit *with such conditions as he or she deems necessary* to ensure that the source will meet the requirements of sections 644.006 to 644.141 and any federal water pollution control act as it applies to sources in this state...”)
(emphases supplied).

When compared to these grants of statutory authority, however, no part of the Land Reclamation Act contains any similar language. The relevant statute here provides, “[i]f the recommendation of the director is for issuance of the permit, the director shall issue the permit without a public meeting or a hearing except that

upon petition, received prior to the date of the notice of recommendation, from any person whose health, safety or livelihood will be unduly impaired by the issuance of this permit, a public meeting or a hearing may be held...” § 444.773.3, R. S. Mo.

When employing principles of statutory construction, the primary rule is to ascertain the intent of the legislature from the language used, by considering the plain and ordinary meaning of the words used in the statute. *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009); *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008) (in the absence of guiding case or other authority, the language of the statute itself provides the best guide to determine the legislature's intent). Each word, clause, sentence, and section of a statute should be given meaning. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993); *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 643 (Mo. App. E.D. 1994). “Where the language of a statute is unambiguous and clear, this Court will give effect to the language as written, and will not engage in statutory construction.” *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007) (citing *Maxwell v. Daviess County*, 190 S.W.3d 606, 610-11 (Mo. App. W.D. 2006)). A court will look beyond the plain meaning of the statute only when the language is ambiguous or will lead to an absurd or illogical result. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998).

Based on their plain language, neither § 444.771, § 444.773, nor any other

provision of the Land Reclamation Act, authorizes the Land Reclamation Commission to impose a condition in a permit which has the effect of moving the applicant's mine plan boundary, or to take any other action to relocate the applicant's mine plan boundary. If the General Assembly had intended to confer authority on the Land Reclamation Commission to impose a condition in a permit, then it would have expressly done so by using language similar to that used when it expressly conferred such authority on the Missouri Air Conservation Commission, the Missouri Clean Water Commission, the Missouri Hazardous Waste Management Commission and the Missouri Department of Natural Resources. Further, if the General Assembly had intended to confer authority on the Land Reclamation Commission to be able to alter, modify or revise provisions in a permit application, then it would have expressly provided for such authority in the Land Reclamation Commission's enabling statutes.

An administrative agency possesses no more authority than that granted to it by statute. *AT & T Information Systems, Inc. v. Wallemann*, 827 S.W.2d 217, 221 (Mo. App. W.D. 1992); *Mueller v. Missouri Hazardous Waste Management Com'n*, 904 S.W.2d 552, 557 (Mo. App. S.D. 1995); *Brooks v. Pool-Leffler*, 636 S.W.2d 113, 119 (Mo. App. E.D. 1982).

In *Mueller*, the central issue was whether the Missouri Hazardous Waste Commission had either express or implicit statutory authority to modify the terms of a hazardous waste permit during a permit appeal. The Appellate Court stated, "[t]he dispositive issue concerns the scope of the Commission's adjudicative authority under the

Act when reviewing newly issued hazardous waste disposal facility permits, specifically, whether it has authority to modify such permits without remand to the DNR?” *Mueller*, 904 S.W.2d at 554. The Court explained:

In their first point, Appellants contend that the Commission, in reviewing DNR’s actions, acted in excess of its statutory authority when it “unilaterally” modified the permit. They insist that the Commission lacked authority to make any modifications in the permit; that it could only affirm, reverse, or reverse and remand DNR’s decision regarding the permit; and that the modification procedure followed by the Commission violated statutory and regulatory requirements designed to insure public scrutiny of the permitting process. Thus, Appellants directly call into question the scope of the Commission’s adjudicative authority when reviewing on appeal an original permit application.

Mueller, 904 S.W.2d at 555.

The issue presented in *Mueller* is the same issue as that presented here - whether the agency has implicit authority to unilaterally modify a permit in an adjudicative proceeding. In analyzing the question, the *Mueller* court compared the permitting statute before it with other environmental permitting statutes. When it did so the Court determined that, while other DNR agencies had express statutory power to impose conditions, the Hazardous Waste Commission did not:

[W]here a legislative body “[h]as consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to

grant the power.’” *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1114 (8th Cir.), 27 A.L.R.Fed. 183 (1973) (quoting *Alcoa Steamship Co. v. Federal Maritime Commission*, 121 App.D.C. 144, 348 F.2d 756, 758 (1965)). As stated before, there is no reference to the power to modify a permit or a DNR decision in § 260.370.3(5) although such authority is expressly conferred both in § 260.410.3 (pertaining to violations of the Act) and in other environmental laws. See § 644.026(13) (authority of the Clean Water Commission) and § 643.060(4), R. S. Mo. 1986 (repealed) (authority of the executive secretary of the Air Conservation Commission). We conclude from such enactments that when the legislature wishes to confer adjudicative authority that includes power to modify, it says so.

Mueller, 904 S.W.2d at 558.

Here (consistent with the Land Reclamation Act) the recommendation of Staff Director Mike Larsen was for the Land Reclamation Commission to issue a permit for a mine of a specified acreage, and having a certain mine plan boundary as specified in the permit application. It was his “recommendation to the commission to issue the new site permit expansion for 76 acres at the Site #2 Quarry in Cape Girardeau County sought after by Strack Excavating L.L.C.” LF 87. He recommended approval of the “pending mining permit application . . .” LF 87. Consistent with the statute, Mr. Larsen did not propose (and the Commission had no authority to impose) any alteration, modification, revision, or

condition to the proposed permit. Because the Commission did unilaterally relocate Strack's mine plan boundary, the Commission erred in approving the permit application.

**II. THE MISSOURI LAND RECLAMATION COMMISSION
ERRED IN APPROVING STRACK'S PERMIT APPLICATION
BECAUSE, PURSUANT TO § 444.772.10, R. S. MO., THE
NOTICE REQUIRED BY THE STATUTE MUST SPECIFY THE
ACREAGE OF THE PROPOSED MINE, AND THE NOTICE
STRACK GAVE DID NOT SPECIFY THE MINE'S ACREAGE,
IN THAT STRACK GAVE NOTICE OF A 76 ACRE MINE AND
THE COMMISSION UNILATERALLY CHANGED THE
PROJECT TO A 53 ACRE MINE**

**The Commission's approval of the Strack permit application was unlawful
because Strack gave notice of a 76 acre mine and the Commission
unilaterally changed the project to a 53 acre mine**

The Land Reclamation Act requires the following notice:

At the time that a permit application is deemed complete . . . the operator shall publish a notice of intent to operate a surface mine [and] . . . send notice of intent to operate a surface mine by certified mail . . . The notices shall include . . . the number of acres . . .

§ 444.772.10, R. S. Mo..

In compliance with the statute, Strack gave notice of a 76 acre quarry. LF

170, Res. Ex. 3. Thereafter, the Land Reclamation Commission unilaterally moved the mine plan boundary, and changed the project's acreage from a 76 acre quarry to a quarry estimated by the Hearing Officer to be 53 acres. LF 144. The "new" mine plan boundary and the resulting "new" acreage have not been the subject of any Public Notice as required by § 444.772.10, R.S. Mo.

The issue of adequate notice under the Land Reclamation Act was before the Court in *Lake Ozark/Osage Beach Joint Sewer Bd. v. Missouri Dept. of Natural Res.*, 326 S.W.3d 38, 42 (Mo. App. W.D. 2010). There, neighboring landowners asserted that the permit applicant's failure to file a map rendered the public notice defective. The Western District disagreed, holding that the notice supplied by the permit applicant was adequate because the information contained on the omitted map was not required by the statute. The Court explained,

we fail to see how the Director's deeming the application complete before [the applicant] filed the map showing the utility easements rendered the subsequent public notice defective. Regulation 10 CSR 40–10.020(2)(H) prescribes the contents of the public notice. The map showing the utility easements is not part of this notice. The information contained on the map is not part of this notice. The public notice is unaffected by the inclusion or exclusion of the map in the application packet.

Lake Ozark, 326 S.W.2d at 42.

In contrast to the omitted map information at issue in *Lake Ozark/Osage Beach Joint Sewer Bd.*, the applicable statute here requires that the project's

acreage be specified:

At the time that a permit application is deemed complete . . . the operator shall publish a notice of intent to operate a surface mine [and] . . . send notice of intent to operate a surface mine by certified mail . . . The notices shall include . . . the number of acres . . .

§ 444.772.10, R.S. Mo.

There has been no lawful notice here because Strack gave notice of a 76 acre mine and, thereafter, the Commission unilaterally changed the project to a 53 acre mine. For this reason also, the Commission's approval of the permit was unlawful.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Court below and hold that the Commission's Final Order is unlawful, that the Commission's issuance of the mining permit is vacated, and remand this matter to the Court below for further proceedings consistent with this Court's decision.

JEFFERY LAW GROUP

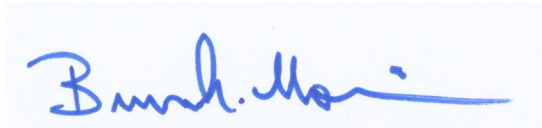


Stephen G. Jeffery, MBE 29949
 Bruce A. Morrison, MBE 38359
 20 S. Central Avenue, Suite 306
 Clayton, Missouri 63105
 (314) 561-8503
 (314) 714-6510 – Fax

ATTORNEYS FOR RESPONDENT

Rule 84.06(c) Certification

The undersigned certifies that the brief contains the information required by Rule 55.03, the brief complies with the limitations contained in rule 84.06 (b), and that there are 4,998 words (all inclusive) in the brief.



Certificate of Service

The undersigned certifies that a true copy of the foregoing document is being electronically filed, and that service will be provided through the electronic filing system upon:

Brian McGovern
400 South Woods Mill Road
Suite 250
Chesterfield, MO 63017
E-mail: Bmcgovern@mlklaw.com

Jenny Frazier
Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102-0899
E-mail: jenny.frazier@ago.mo.gov

